

Lau Yaw Seng v Cooperativa Ceramica D'Imola

HIGH COURT (SINGAPORE) — SUIT NO 1500 OF 1990
CHAO HICK TIN J
29 NOVEMBER 1990

Sale of Goods — Sale by sample — Goods did not conform to sample — Payment by way of irrevocable letter of credit — Interim injunction against payment of letter of credit — Whether there was fraud on part of seller — Balance of convenience

Banking — Letter of credit — Payment for goods by way of irrevocable letter of credit — Interim injunction against payment of letter of credit — Whether there was fraud on part of seller — Balance of convenience

The plaintiff was a businessman dealing in building materials. In March 1990, he attended a ceramic fair in Spain and saw a sample of goods in the stand of the defendant. After being assured that the defendant could supply the tiles of the quality at the fair, the plaintiff executed a memorandum of intent to purchase a certain quantity. He received a sales contract from the defendant's agent in Singapore which stipulated that payment was to be by way of a confirmed irrevocable letter of credit in favour of the defendant. Accordingly such a letter of credit was issued by Banca Commerciale Italiana ('the bank') and despatched to the defendant.

In June 1990, the plaintiff received the goods and upon unstuffing the container, he discovered that the tiles were not of the same quality as the samples he had seen. The plaintiff rejected the goods and orally demanded that the defendants ship the goods back. Subsequently the plaintiff's solicitor wrote to the defendant demanding that they arrange for the return shipment and reimburse the plaintiff's loss and damages. They also threatened to take out an injunction to stop payment on the letter of credit. The plaintiff alleged that the defendant's conduct in refusing or neglecting to give positive response until the written letter from his solicitor showed that there was fraud on the defendant's part. Further he contended that the strategy of the defendant was to delay responding earlier and to wait for the letter of credit to mature. The tiles supplied were not fit for the purpose and nobody would buy them.

The plaintiff obtained, by way of an ex parte application, an injunction against the defendant and served the order on the bank. The bank applied to discharge the interim injunction in so far as it affected the letter of credit issued by them, submitting that there was no evidence of fraud, and on the balance of convenience the bank would suffer damage to its reputation which would be both irreparable and incapable of precise quantification if the allegation of fraud could not be made out at trial.

Held, allowing the bank's application:

(1) It is quite clear that what was in dispute was the performance of the contract, ie the quality of the goods shipped by the defendant. What were shipped were ceramic tiles though not of the quality or standard the plaintiff alleged he saw in Spain. It might well be a case where the plaintiff was entitled to reject the goods and refuse to pay the defendant but on the facts, the court could not say that the only realistic inference to draw was that of fraud. It is certainly not enough to allege fraud; it must be established. This ground alone would suffice to discharge the injunction.

(2) The balance of convenience lay in favour of the bank and by the application it directly assumed responsibility for its act. The injunction would be inappropriate as it interferes with the bank's obligation and might cause greater damage than the plaintiff could pay on the undertaking.

Cases referred to

- 1 *Korea Industry Co Ltd v Andoll Ltd* [1989] 3 MLJ 449 (folld)
- 2 *United City Merchants (Investments) Ltd & Ors v Royal Bank of Canada & Ors* [1982] 2 Lloyd's Rep 1 (refd)
- 3 *United Trading Corp SA v Allied Arab Bank* [1985] 2 Lloyd's Rep 554 (refd)
- 4 *Edward Owen Engineering Ltd v Barclays Bank International* [1978] 1 All ER 976 (refd)
- 5 *RD Harbottle v National Westminster Bank* [1977] 2 All ER 862 (folld)

Jacqueline Loh (Ms) for the plaintiff.
Jonathan Patel for the bank.

Cur Adv Vult

Chao Hick Tin J: The plaintiff was a businessman dealing in building materials. Sometime in early March 1990, he attended a ceramic fair at Valencia, Spain. He saw a sample of goods on display in the stand of the defendant. The goods were ceramic tiles with inlaid design in the nature of random veins running on the face of the tiles. The surface of the tiles was smooth with no grooves or holes. The plaintiff said that, in so far as he was concerned, that was a very important consideration because if the tiles were not properly inlaid it would invariably be filled up with cement in the course of laying. According to the plaintiff, on being assured by the defendant's representative at the stand that all the ceramic tiles of that category were of that quality, he decided to make an order of the same. Accordingly, the plaintiff executed a memorandum of intent (in Italian) to purchase a certain quantity of the tiles.

On or about 23 March 1990, after his return from Spain, the plaintiff received a document entitled 'Sales Contract' from the defendant's agent in Singapore, Stork Building Product Pte Ltd. This sales contract described the goods to be sold and the price therefor and also stated that payment was to be by way of a confirmed irrevocable letter of credit in favour of the defendant. Accordingly, on or about 9 April 1990, the plaintiff applied to Banca Commerciale Italiana (Singapore branch) for such a letter of credit against presentation of document 90 days from the date of the bill of lading. The letter of credit was issued by Banca Commerciale Italiana on 11 April 1990 in favour of the defendant, and was duly despatched to the defendant. On 15 May 1990, the defendant confirmed by telex that it had received the letter of credit and that the goods would be sent immediately.

On or about 23 June 1990, the plaintiff's forwarding agent took delivery of a container from the Port of Singapore Authority. On or about 25 June 1990, when

the plaintiff unstuffed the container, he discovered that the tiles were not properly inlaid but were covered with grooves and holes. He alleged that they were 'manufacturers' reject'. The plaintiff immediately called the defendant's agent in Singapore and spoke to one Mike Tan. The plaintiff told him that he could not accept the goods and had to reject them. The plaintiff also asked Mike Tan to arrange for the shipment of the goods back to the defendant. Mike Tan told the plaintiff that he would relay the message to the defendant. All this was oral.

According to the plaintiff, subsequently he had a number of further oral conversations with Mike Tan to expedite the matter. Only on 14 August 1990 did the plaintiff send Mike Tan a fax reminder, which fax was also copied to the defendant.

Soon after that, the plaintiff consulted his solicitors who on 18 August 1990 wrote to the defendant as well as its Singapore agent. The material part of the letter read as follows:

... Upon opportunity to inspect the goods our clients realized that the goods were defective. It is suffice to say that the circumstances and the nature of the defect is such that your principal knows best and that our clients have informed you that they reject the goods and to arrange for the goods to be returned. We reserve our rights to comment further on the merits when the need arises. We are instructed that on 14 August 1990 our clients wrote to your agent Stork Building Product Pte Ltd on this matter and was told that you will check the status during your next visit.

We are now instructed to demand that either you or your agent on your behalf provide an undertaking to arrange for the return shipment of the goods within the next 24 hours and reimburse all our clients' loss and damages.

Kindly note also that while the letter of credit matures on 27 August 1990 payment by way of cable transfer may be made earlier. Please note that in the absence of a timely positive response our clients are obliged to take actions before payment of the letter of credit including an injunction to prevent payment of the said letter of credit.

Two days later on 20 August 1990, the defendant replied to the plaintiff's solicitors. The material part was as follows:

We have just received your above mentioned letter concerning our client Hoe Lat Building Materials Ent. For which we kindly ask you do not act so quickly as stated (within 24 hours) as it would be impossible for us, from Italy, to organize the return of the goods in a such short delay.

In any case before proceeding we would like to know which defects the goods present since we have shipped three different kinds of items. We also would like to inform you that our area manager has already planned a trip to Singapore for the first 15 days of next month and he will be available to see defective material during his visit.

The plaintiff said that this was his first dealing with the defendant. The plaintiff alleged that the defendant's

A conduct in refusing or neglecting to give a positive response to all oral complaints, until the written letter from the plaintiff's solicitors, showed that there was fraud on the part of the defendant. The plaintiff contended that the strategy of the defendant was to delay responding earlier and to wait for the letter of credit to mature. The plaintiff alleged that the tiles were not presentable; they were not fit for the purpose and nobody would buy them.

B On an ex parte application made by way of summons-in-chambers in this suit, the plaintiff applied to a judge for an interim injunction against the respondent and an order was accordingly obtained in these terms:

C ... that the defendants by their servants or agents or officers or bankers or otherwise howsoever be restrained and an injunction is hereby granted restraining them from removing/disposing/withdrawing/dissipating/transferring or assisting to do the same from the jurisdiction of the court or otherwise disposing of any of their assets including any money forming or forming part of an account otherwise in their name or to their credit and in particular a letter of credit No 12996 opened by the plaintiff with Banca Commerciale Italiana or their claim thereto save insofar as such assets exceed S\$65,000 with Banca Commerciale Italiana Singapore branch until judgment of the action or until further order in the matter.

D E The plaintiff served the order on Banca Commerciale Italiana. On 3 November 1990, Banca Commerciale Italiana applied by way of summons-in-chambers to have the interim injunction granted on 22 August 1990, in so far as it affected the letter of credit issued by that bank, discharged.

F When the matter came up for hearing before me on 10 November 1990, I directed that a further affidavit be filed by the plaintiff stating whether the defendant's representative did, as promised, come to Singapore to inspect the goods under complaint and exhibiting all subsequent correspondence. In the affidavit filed pursuant to that direction, the plaintiff deposed that the representative was in Singapore on 9 and 10 of September 1990. A joint inspection was carried out. The plaintiff then went on to say that 'it was apparent that the goods sent to us were rejects. However, the defendant's representative absolutely refused to accept service of the writ and left Singapore.'

H I note, however, that on 11 September 1990, the defendant faxed a reply to the plaintiff as follows:

I Following our meeting in your offices on 10 September 1990, we hereby confirm the absolute first quality of our materials shipped to you by our Invoice No 43435 dated 21 May 1990. We want to stress once again the fact that the materials you received are according to the samples you saw in Valencia last March and on which you placed your order with us.

You are kindly requested therefore to pay in full the amount showed by L/C No 12996.

Anyway, as a gesture of goodwill and favour in your respect, we will do our best to try and find another customer who is willing to purchase the material you have in stock now.

It is understood, as you stated, that all freight charges from Singapore to the final destination (whatever it is), will be at your expenses.

Counsel for Banca Commerciale Italiana argued for the discharge of the injunction, insofar as it affected the letter of credit, on two grounds. First, he submitted that there was no evidence of fraud. If at all, this was a simple case of a breach of contract. Secondly, on a balance of convenience that part of the injunction in so far as it affected the letter of credit should be discharged because if it were subsequently shown that the allegation of fraud was not made out at the trial the bank would have suffered damage to its reputation which would be both irreparable and incapable of precise quantification. However, if the injunction were refused and the plaintiff should eventually succeed to prove fraud at the trial, he would have suffered no loss because the bank's claim against him for reimbursement would have failed. My attention was drawn particularly to pp 651 - 652 of *Paget's Law of Banking* (10th Ed).

The law on this subject was recently pronounced upon in a local case *Korea Industry Co Ltd v Andoll Ltd*.¹ There the Court of Appeal stated the law as follows (at p 450):

First, in the ordinary course of events, the court will not restrain the payment of funds due under an irrevocable letter of credit. It will not do so simply because a dispute exists between the buyer and seller with regard to the contract underlining the letter of credit.

Second, the court may, exceptionally, enjoin payment under an irrevocable letter of credit where there has been or is likely to be a fraudulent demand under the contract and the bank is aware that the demand, made or to be made, is fraudulent.

In *United City Merchants (Investments) Ltd & Ors v Royal Bank of Canada & Ors*,² Lord Diplock explained the law and the rationale for it, in these terms (at p 6);

If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods; that does not permit of any dispute with the buyer as to the

A performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

and later he said:

B To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue.

C On the facts of the present case that I have outlined above, it was quite clear to me that what was in dispute was as to the performance of the contract, ie the quality of the goods shipped by the defendant to the plaintiff. What were shipped were ceramic tiles, though not of the quality or standard the plaintiff alleged he saw at Valencia, Spain. It might well be a case where the plaintiff was entitled to reject the goods and refuse to pay the defendant. While my sympathies were with the plaintiff, I did not think that any real evidence of fraud was shown. To adopt the words of Ackner LJ in *United Trading Corp SA v Allied Arab Bank*,³ on the facts before me I could not say that the 'only realistic inference to draw' was that of fraud. As the Court of Appeal stated in *Korea Industry*¹ at p 452, 'where fraud is alleged at an interlocutory stage in an action, there must be clear evidence to support the allegation'. Just as instructive is the case *Edward Owen Engineering Ltd v Barclays Bank International*⁴ which concerned a confirmed performance guarantee. There, Browne LJ said at p 984, 'it is certainly not enough to allege fraud; it must be established, and in such circumstances I should say very clearly established'.

F On this ground alone, it should suffice to discharge the injunction in so far as it affected the letter of credit.

G Turning to the second ground, it seemed to me clear that the balance of convenience is in favour of Banca Commerciale Italiana. I accepted the submission of counsel for Banca Commerciale Italiana on this point. By making this application, Banca Commerciale Italiana directly assumed responsibility for its act. I propose to cite only the following passage in the judgment of Kerr J in *RD Harbottle v National Westminster Bank*⁵ at p 869:

H The plaintiffs then still face what seems to be an insuperable difficulty. They are seeking to prevent the bank from paying and debiting their account. It must then follow that if the bank pays and debits the plaintiffs' account, it is either entitled to do so or not entitled to do so. To do so would either be in accordance with the bank's contract with the plaintiffs or a breach of it. If it is in accordance with the contract, then the plaintiffs have no cause of action against the bank and, as it seems to me, no possible basis for an injunction against it. Alternatively, if the threatened payment is in breach of contract, which the plaintiffs' writs do not even allege and as to which they claim no declaratory relief, then the plaintiffs would have good claims

for damages against the bank. In that event the injunctions would be inappropriate, because they interfere with the bank's obligations to the Egyptian banks, because they might cause greater damage to the bank than the plaintiffs could pay on their understanding as to damages, and because the plaintiffs would then have an adequate remedy in damages. The balance of convenience would in that event be hopelessly weighted against the plaintiffs.

I therefore was of the view that the bank also succeeded on the second ground.

Application allowed.

Solicitors: *Cheow Hin & Partners; Rodyk & Davidson.*

Reported by *Yap Shao Sin*

Low Pu Tong v Housing and Development Board

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS
NO 1189 OF 1989
SINNATHURAY J
30 OCTOBER 1990

*Contract — Service contract — Wrongful dismissal — Whether employer entitled to terminate employee's service with notice — Letter of appointment — Whether superseded by subsequent em-
placement of employee on permanent establishment — Whether employee entitled to reinstatement — HDB Rules and Regulations — Application of*

Labour Law — Wrongful dismissal — Contract of service — Termination — Notice to be given — Compliance with employer's rules and regulations

The plaintiff was an employee of the Housing and Development Board ('HDB'). He was appointed a works apprentice under a letter of appointment wherein it was specifically provided that the plaintiff's services may be dispensed with by the HDB without any reason being given. Eight years later, the plaintiff was placed on the permanent establishment of the HDB by a letter which stated, inter alia, that this appointment was subject to HDB's Rules and Regulations, conditions of service and any directives issued from time to time. In 1987, the plaintiff was suspended from duties on half-month's pay as he had had been charged with corruption in the subordinate courts. Subsequently, the plaintiff was granted a discharge amounting to an acquittal as the prosecution decided not to proceed. In 1989, the HDB terminated his services with one month's pay in lieu of notice. The plaintiff returned the money to HDB and commenced proceedings for a declaration that his dismissal by the HDB was wrongful.

Held, granting the application:

(1) It is settled law that to be emplaced on the permanent establishment does not mean that the employee would have security of tenure for life ending on his retirement but as to how his contract of service may be terminated must be decided on the relevant rules and regulations that apply to the particular contract of service.

(2) The second letter emplacing the plaintiff on the permanent establishment superseded the works apprentice letter.

A Therefore, the HDB was not entitled to terminate the employee's service by giving one month's notice.

(3) The HDB Rules and Regulations did not contain a provision relating to the termination of services of an employee by the HDB. The Rules and Regulations only provided as to how an employee may be dismissed from the service. So, if the HDB wanted to terminate the services of the plaintiff, they would be obliged to hold disciplinary proceedings against the plaintiff and comply with r 119 of the HDB Rules and Regulations.

Cases referred to

- 1 *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594 (distd)
- 2 *Chiam Heng Hsien v Jurong Town Corporation* [1986] 1 MLJ 121 (foldd)

C

Lauren Ong Ting Lan for the plaintiff.
Abu Bakar bin Bawah for the defendants.

Cur Adv Vult

Sinnathuray J: In this originating summons the plaintiff claims against the defendants, the Housing and Development Board ('HDB'), for a declaration that the dismissal of the plaintiff by the defendants is wrongful. The two other matters in the originating summons are for further or other relief and costs.

E Miss Ong, who appears for the plaintiff, referred to the undisputed facts in this case. They are these. The plaintiff was an employee of the HDB. He was appointed a works apprentice under a letter of appointment dated 24 January 1972. It is specifically provided in para 3(e) of the letter that the plaintiff will not leave the service of the HDB without giving one month's notice in writing and if he does so, he agrees to pay as liquidated damages a sum equal to one month's salary; and, para (f) states that during the continuance of his appointment the plaintiff's services may be dispensed with by the HDB without any reason being given.

G Some eight years later, by a letter dated 13 October 1980, the plaintiff was placed on the permanent establishment of the HDB. That letter states as follows:

I am pleased to inform you that management has agreed to emplace you on the permanent establishment at your existing salary and salary scale with effect from 1 October 1980.

You will retain your present incremental date.

H Your appointment on the permanent establishment is subject to all the Board's Rules and Regulations, conditions of service and any directives issued from time to time.

I Another seven years went by. On 11 July 1987, the plaintiff was suspended from duties on half-month's pay. He had been charged in the subordinate courts on certain charges of corruption. Subsequently, on 29 April 1989, the prosecution decided not to proceed with the charges and the court granted the plaintiff a discharge amounting to an acquittal on all the charges that were before the court.